MENSA MERCANTILE (FAR EAST) PTE. LTD.

v.

EIKOBINA (M) SDN. BHD. & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
RICHARD TALALLA JC
[SUIT NO. 22-378 OF 1988]
28 NOVEMBER 1990

CIVIL PROCEDURE: *Striking out - Res judicata - Issue estoppel - Requirement - Privity of interest - Knowledge - Rule of the High Court 1980, O. 18 r. 19.*

The plaintiff M entered into an agreement to purchase certain construction equipment from the first defendant D1. When D1's solicitors advised M's solicitors that D1 has sold the equipment to D2, M sued D1 for specific performance and damages for breach of contract (the first action). D1 contended that as M had failed to pay the purchase price within the stipulated time, M had repudiated the contract.

At that trial of the first action, HK, chairman and director of D1, testified that the equipment belonged to the second defendant, D2 and that D1 was the Malaysia agent of D2. M obtained judgment for damages for breach of contract but not for specific performance as it was held that M had failed to establish that the equipment was not easily available in the market.

M then bought this present action contending that the purported sale which was not carried out was fraudulent and was made for the purposes of preventing M from enforcing specific performance against D1 and that D1, D2 and D3 had conspired to cheat and deceive M; M sought a declaration that the agreement and sale of the equipment was null and void, damages for conspiracy and injunction restraining D1, D2 and D3 from removing the equipment from Malaysia.

The defendants applied under O. 18 r. 19 of the Rules High Court 1980 (RHC) for striking out of the statement of claim on the ground that this action was *res judicata*.

Held:

[1] For the doctrine of *res judicata* and issue estoppel to apply there must also be privity of interest between the defendant in the first action and the defendants in the second action.

[2] Upon a perusal of the pleadings and the evidence led in the first action and the pleadings, affidavit evidence and argument of Counsel in this action and particularly in view of the fact that M's chief executive officer knew that the equipment had been transferred to D2 and that the directors of D1 and D2 were the same, there is privity of interest between the defendants in this action.

[3] M should be precluded from bringing this action and in answer to the defendants' application offered this Court no reason why M could not, with reasonable diligence have claimed in the first action the relief it was claiming against the defendants in this action.

[4] (a)It was clear that M at the time material to the first action knew of the *nexus* between D1 and the defendants in this action and if M had exercised reasonable diligence, it could have sought in the first action the relief it was claiming in this action;

(b) it seems that M having failed to obtain specific relief in the first action was seeking a proverbial second bite off the cherry in this action.

[Defendant's application allowed.]

Cases referred to:

Brisbane City Council & Myer Shopping Centres Pty. Ltd. v. Attorney-General for Queensland [1979] AC 411 at p. 425

Carl Zeiss Stiftung v. Rayner & Keeler Ltd. & Ors. [1967] AC 853

Gleeson v. J Wippell & Co. Ltd. [1977] 3 All ER 54

Henderson v. Henderson [1843] 3 Hare 100

Superintendent of Pudu Prison & Ors. v. Sim Kie Chon [1986] CLJ (Rep) 256

Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor., [1975] AC 581

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Lee Fei Fung and subsequently Wong Kim Fatt; M/s. Gulam & Wong
For the defendants - Nagarajah; M/s. Shook Lin & Bok

JUDGMENT

Richard Talalla JC:

On 25 August 1987 Mensa Mercantile (Far East) Pte. Ltd. (Mensa) commenced action (the first action) in the High Court at Kuala Lumpur against Eikobina (M) Sdn. Bhd. (Eikobina) claiming specific performance of an agreement dated 6 May 1987 whereunder Eikobina agreed to sell and Mensa to buy certain construction equipment for a consideration of Japanese Yen 92,500,000. Mensa also claimed general damages for breach of contract. Eikobina served a defence and counterclaim in the first action. It was dated 9 January 1988 and amended on 3 September following wherein they pleaded that time was of the essence of the agreement and that the plaintiff had failed to pay the purchase price within the stipulated time and by such conduct had evinced an intention no longer to be bound by the agreement and had repudiated the same.

At the trial of the first action there was adduced in evidence by Eikobina a letter dated 15 August 1987 from Eikobina's solicitors to Mensa's solicitors informing the latter that Eikobina had sold the equipment to Edogawa Shuseki Centre Co. Ltd. (Edogawa).

Mensa's chief executive officer one Mr. Derrick Ong gave evidence in the first action confirming that Eikobina's solicitors had informed him of the sale to Edogawa. He testified that he made a company search and discovered that the directors of Edogawa were the same as the directors of Eikobina and that one Mr. Hirose Katsumi was chairman and director of the defendant company. He added that after he had been informed that the equipment had been sold to Edogawa he asked his solicitors to sue for specific performance which of course they did against Eikobina but not the defendants in this action. Mr. Katsumi testified for the defence. He gave evidence to the effect that the equipment belonged to Fuji Sangyo Pte. Ltd. (Fuji) and that Eikobina was the Malaysian agent of Fuji. He also testified that he was the owner of both these companies and added that he was a shareholder of Edogawa owning 80% of that company and controlling it.

Judgment in the first action was delivered on 2 February 1989. The learned Judge found that Eikobina had breached the agreement. Her Ladyship then posed the question whether Mensa could succeed on its plea to have the agreement specifically enforced. The Judge said that Mensa was required to establish that the equipment was not easily available in the market and as such was of unique interest and value to it. The learned Judge found that Mensa had not discharged the *onus* of so establishing and on that ground alone Her Ladyship considered that damages were an adequate remedy for Eikobina's breach and gave judgment for damages for breach of agreement.

On 19 November 1988 Mensa commenced this action here in the High Court at Johor Bahru against Eikobina, Fuji and Edogawa wherein Mensa pleaded that Eikobina, Fuji and Edogawa had common directors and/or shareholders, referred to the said agreement, explained that Eikobina refused to perform the agreement, referred to the first action and went on to plead that in the course of the trial of that action Eikobina's witnesses gave evidence that the equipment did not belong to Eikobina but to Fuji and that Eikobina purported to sell the equipment to Edogawa. Mensa went on to aver that these facts were not pleaded in the defence in the first action, but not the reason for not doing so. Mensa went on to plead that the purported sale which had not been carried out was a fake or a fraud made with the intention or purpose of preventing Mensa from enforcing specific performance against Eikobina and that Eikobina, Fuji and Edogawa had conspired to cheat or deceive and had thereby caused loss and damage to Mensa. Mensa claimed in this action an injunction restraining the 3 defendants by themselves their servants or agents from moving the equipment from their then location in Malaysia and a declaration that the agreement and sale of the equipment was null and void and damages for conspiracy.

The defendants applied pursuant to the provisions of O. 18 r. 19 of the Rules of the High Court 1980 and under the Court's inherent jurisdiction for an order that the writ and statement of claim herein be struck out as scandalous or frivolous or vexatious or as being otherwise an abuse of the process of the Court and that they disclosed no reasonable cause of action, as the case may be. In particular the defendants sought to set aside the writ and statement of claim because, so they claimed, this action was *res judicata* in the "wider sense". Counsel for the defendants cited the Privy Council case of *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor.*, [1975] AC 581 where Lord Kilbrandon, delivering the judgment of their Lordships, said in regard to the doctrine of *res judicata* at p. 590 as follows;

> But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram V.C. in *Henderson v. Henderson* [1843] 3 Hare 100, 115, where the Judge says:
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> > where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

In *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. & Ors.* [1967] AC 853 Lord Guest after stating that the principle of *res judicata* has developed so as to extend to what is now described as "issue estoppel" said at p. 935;

> The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

However for the doctrine of issue estoppel to apply there must also be privity of interest between the defendant in the first action and the defendants in this action. As in the case of *Gleeson v. J Wippell & Co. Ltd.* [1977] 3 All ER 54, the question that arises is the meaning of "privity" in this context. In that case Meggary V-C said at p. 59:

> The requisite privity is said to be a privity either of blood, of title, or of interest: see *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd.* per Lord Reid. Plainly there is no question of blood or title in this case, and so only privity of interest can be in question. One difficulty about this is the protean nature of the word 'interest', a term which at times seems almost capable of meaning all things to all men. Another difficulty is that, as Lord Guest pointed out in *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd.* 'there is a dearth of authorities in England on the question of privies'. From such authorities as there are, it is by no means easy to distil any principle. In *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan & Agency Co.* a plaintiff had sued an American company. Under an indemnity given to that company by an English company the English company assisted the American company in the litigation and paid its costs. The plaintiff won, and then sued the English company, contending that the English company was really the defendant in the first action, and so was estopped from disputing the plaintiff's claim. Romer J, however, rejected this contention; and in *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd.* Lord Reid's reference to this decision was certainly not in terms of disapproval. The fact that there would be an estoppel as between the indemnifier and the indemnified does not produce an estoppel *quo ad* third parties. In that respect, an agreement to indemnify creates no privity.
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> It has also been held that a judgment against A in one capacity does not bind him in another capacity. Thus a finding of negligence against him in proceedings in which he is concerned in his personal capacity does not bind him in proceedings in which he engages in his capacity as his wife's personal representative: *Marginson v. Blackburn Borough Council.* Again, if A purports to act as agent for B, and the plaintiff then successfully sues A for breach of warranty of authority, B cannot be regarded as privy to A in those proceedings: *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd.* In that case Buckley J said that he had been referred to - 'no authority which indicates at all clearly what kind of interest in earlier litigation relied on as constituting a *res judicata* is sufficient to render someone who was not a party, and is not a successor in title to a party to that litigation, privy to a party for the purpose of the doctrine.'
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> Privity for this purpose is not established merely by having 'some interest in the outcome of litigation.' So far as they go, I think these authorities go some way towards supporting the contention of Counsel for the plaintiff that the doctrine of privity for these purposes is somewhat narrow, and has to be considered in relation to the fundamental principle *nemo debet bis vexari pro eadem causa*.

It has been stated in the Supreme Court that even where *res judicata* is not strictly established or where estoppel *per rem judicatam* has not been sufficiently pleaded or made out but nevertheless the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the Court will not hesitate to dismiss the action. See the judgment of Abdoolcader SCJ in *Superintendent of Pudu Prison & Ors. v. Sim Kie Chon* [1986] CLJ (Rep) 256, wherein his Lordship considered that it would suffice in that regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty. Ltd. v. Attorney-General for Queensland* [1979] AC 411 at p. 425.

Upon a perusal of the pleadings and the evidence led in the first action and the pleadings, affidavit evidence and argument of Counsel in this action and particularly in view of the fact that Mensa's chief executive officer knew that the equipment had been transferred to Edogawa and the director of the 2 companies were the same I consider that there is privity of interest

between the defendants in this action and Eikobina the defendants in the first action to the end that Mensa should be precluded from bringing this action and in this regard I place reliance on the cases referred to above. Mensa in answer to the defendants' application offered this Court no reason why it, Mensa, could not with reasonable diligence have claimed in the first action the relief it was claiming against the defendants in this action. On the evidence before me it was clear that Mensa at the time material to the first action knew of the *nexus* between Eikobina and the defendants in this action and exercising reasonable diligence could have sought in the first action the relief it was claiming in this action. It seemed to me that Mensa having claimed but failed to obtain specific relief in the first action was seeking a proverbial second bite off the cherry in this action.

Accordingly the defendants' application for an order that the writ and statement of claim be struck out is allowed with costs to be taxed.

Also found at [1991] 1 CLJ 772